Docket: 2016-139(IT)I

BETWEEN:

JAY Z. KALRYZIAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on August 15, 2016, at Hamilton, Ontario.

Before: The Honourable Justice Gaston Jorré

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Dominique Gallant

AMENDED JUDGMENT

In accordance with the attached reasons for judgment, the Appellant's appeal with respect to the 2007 and **2008** taxation years is allowed, without costs, and the matter is sent back to the Minister of National Revenue for reconsideration and reassessment on the basis that:

a. in the 2007 taxation year, employment expenses totalling $1,045.05 are to be allowed;
b. in the 2008 taxation year, employment expenses totalling $963.89 and rental expenses totalling $1,426 are to be allowed;
c. in both taxation years the penalties under subsection 163(2) of the *Income Tax Act* are to be adjusted to take account of the expenses allowed in a. and b. above.

The amended judgment and amended reasons for judgment are issued in substitution for the judgment and reasons for judgment signed on August 26, 2016.

Signed at Ottawa, Canada, this 27th day of September 2016.

"Gaston Jorré"

Jorré J.

Citation: 2016 TCC 186
Date: 20160927
Docket: 2016-139(IT)I

BETWEEN:

JAY Z. KALRYZIAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR JUDGMENT

Jorré J.

Introduction

[1] This is a case about salesman's expenses and rental losses.

[2] The Appellant appeals from reassessments of the 2007 and 2008 taxation years. In both years the reassessments disallowed all the employment expenses as well as all the investment carrying charges claimed. In 2008 the Minister of National Revenue (the "Minister") also disallowed almost all the various rental expenses claimed thereby denying the rental loss claimed by the Appellant. In addition, gross negligence penalties were levied pursuant to subsection 163(2) of the *Income Tax Act* (the "*Act*").

[3] To a large extent, this appeal turns on findings of fact and it will be useful to begin with some background. During the period in question the Appellant sold electronics at Future Shop. His earnings came primarily from commissions.

[4] The Appellant's brother trained him in how to sell in a way that would be very profitable in terms of commissions.

[5] A tax preparer named Attilio Ciurcovich was recommended to the Appellant. After going to meet and interview Mr. Ciurcovich he decided that he wanted to use the services of Mr. Ciurcovich who charged $500 per tax return.

Although expensive this seemed worthwhile to the Appellant because Mr. Ciurcovich would coach clients and explain how to get their receipts organized so as to take advantage of available deductions. Mr. Ciurcovich's approach was aggressive; as the Appellant put it: if an expense helped to sell goods then it was deductible.

[6] Mr. Ciurcovich also promised to take care of any issues with the Canada Revenue Agency (the "CRA"); Mr. Ciurcovich wrote on behalf of the Appellant a number of times. Mr. Ciurcovich appeared to be a very popular tax preparer and was used by other sales representatives at the Future Shop where he worked.

[7] The Appellant followed Mr. Ciurcovich's instructions, brought his receipts to Mr. Ciurcovich and filed the returns prepared by Mr. Ciurcovich. On both the 2007 and 2008 income tax returns Mr. Ciurcovich did not fill in his name and address in the box for Professional Tax Preparers, line 490, on page 4 of the returns.

[8] In the 2007 taxation year the Appellant filed a tax return showing some $44,781 in employment income and claiming $26,571 of employment expenses. These expenses were about 59% of his employment income. An amount of $1,858 was claimed on line 221, carrying charges and interest expense.

[9] As filed, the Appellant's 2007 return, Exhibit R-1, showed no federal or Ontario tax payable. As a result the Appellant claimed a refund of all income tax deducted as well as certain refundable credits.

[10] In the 2008 taxation year the Appellant filed a tax return showing employment income of some $45,623 and employment expenses of $25,012. These expenses are slightly less than 55% of the employment income. He also claimed a deduction of $2,308 for carrying charges and interest expense on line 224 as well as a rental loss of $9,241.28; this rental loss was his half of a $18,482 loss for the entire rental property.

[11] Again, as can be seen on page 4 of the 2008 return, the last page of Exhibit R-2, the return showed no federal or provincial tax payable. He claimed a refund of all income tax deducted. He also claimed certain refundable credits.

[12] On initial assessment, the two returns were assessed as filed.

Salesman's Expenses

2007 Expenses

[13] I will now turn to each set of issues in turn. I will start with the employment expenses and with the question: what expenses were incurred, and to what extent, for employment purposes? I will deal later with the remaining conditions. The Minister assumed, among other assumptions, that no employment expenses were incurred.

[14] When dealing with claims for employee expenses it is worth bearing in mind the opening paragraph of subsection 8(1) as well as subsection 8(2) of the *Act*. They state:

> 8(1) In computing a taxpayer's income for a taxation year from an office or employment, there may be deducted such of the following amounts as are wholly applicable to that source or such part of the following amounts as may reasonably be regarded as applicable thereto:
>
> . . .
>
> (2) Except as permitted by this section, no deductions shall be made in computing a taxpayer's income for a taxation year from an office or employment.
>
> [Emphasis added.]

[15] For the reasons set out below, I have great difficulty in accepting that the Appellant had more than a modest amount of selling expenses that could be deducted.

[16] The Appellant brought copies of a great many receipts, credit card statements and the like in support of his salesman expense claims. These were organized under various headings but did not correspond with the headings in the expense statements prepared by Mr. Ciurcovich and included with the tax returns.

[17] In 2007 the Appellant claimed $26,571 in expenses. This included an amount of $2,461 under the heading "Boots and Gloves". The Appellant had no idea why Mr. Ciurcovich had called this heading "Boots and Gloves"; he guessed that it might relate to clothing although his receipts did not show amounts spent for clothing.

[18] In any event, based on the evidence I heard there could not be any deductible amount for clothing. The employer provided a shirt to be worn but otherwise

simply had a dress code specifying, for example, the colour of the pants to be worn. There is simply nothing in the evidence to suggest a requirement for a uniform or other specialized clothing paid for by the employee. As a result there could not be a basis for deductible clothing expense.

[19] The total of the receipts and other documents that the Appellant included in Exhibit A-1 and which are summarized in the cover sheets of the exhibit is about $20,000 including everything in Exhibit A-1. However within that amount there are over $5,000 in mutual fund purchases (Tab J), amounts clearly unrelated to the Appellant's job as a salesman.

[20] In Tabs H and I are all the expenses of the Appellant's car including fuel, traffic tickets and the cost of buying a second-hand automobile. The cost of the car purchased was simply expensed rather than capitalized.

[21] The Appellant's evidence is that he had one car for both personal and work use. No effort was made either by Mr. Ciurcovich or by the Appellant to allocate automobile expenses between work related and personal use.

[22] The Appellant kept no log of his kilometres and his evidence does not provide a basis on which one could estimate what kilometres were in the course of his employment. His only evidence on this is twofold. First, in addition to his work at his regular store he was occasionally asked to work elsewhere: for example, at a grand opening of a new store. Secondly, he testified that, before the store had a delivery service, he would sometimes deliver large televisions to clients after he left work. His testimony was that this helped to close sales because he was able to say "if you buy it today I will deliver it tonight".

[23] Also included in the documents in Exhibit A-1 were all his costs of his mobile phone (Tab E), his home Internet and his home satellite television (Tab F). With respect to the mobile phone the Appellant had one mobile phone which he said he used for work as well **as** personal use. With respect to home Internet and satellite television his explanation as to how these were related to selling was that this helped him to understand what he sold.

[24] With respect to the phone, it is not at all clear on what basis I could reach a conclusion as to a particular portion of business use. The evidence does not suggest any obvious allocation. I might add that, given that stores normally have land lines, it is not apparent to me why the store's landline would not have been the principal method of work related phone communication for the Appellant.

[25] As to the Appellant's home Internet and home satellite television being a sales expense because it gave him a better understanding of products he was selling, the claim is "a stretch". Ongoing expenditures for home Internet and home satellite television or cable are personal consumption expenditures. They are not deductible.

[26] The other major group of expenditures set out in the documents in Exhibit A-1 are expenditures for, to use the Appellant's label, "product knowledge". These were some $4,000 in expenditures to buy various products from Future Shop. According to the Appellant employees were given discounts to encourage them to buy products sold so they would know the products and be better able to sell them. Examples of these purchases were car speakers and their installation, a wireless controller for the Blu-ray player on a gaming console and a Harman Kardon receiver. Again, these are personal expenditures and are not deductible.

[27] The above claims are exaggerated to the point where I cannot accept that the Appellant is being forthright in his testimony. As a result I am unable to accept much of his testimony.

[28] There remain two other categories in Exhibit A-1. First, at Tab I there is a small amount for interest on the Appellant's Visa card as well as the annual fee. Nothing in the evidence explains how this would be related to his expenses as a salesman. Secondly, at Tab F there are some $400 in assorted expenses of which more than half are for business cards and a photograph used for the cards. The cards are useful for a salesman. There is also a charge for parking, presumably at an airport, since it says "Park & Fly", and a motel 6 charge for a business trip. While the Appellant testified that he sometimes worked at other stores he did not testify that he had to fly to the location of another store or that he had to stay overnight.

[29] In all this there may be a small amount of expenses that are related to the Appellant's employment but, in general, I am at a loss to determine what the amount might be.

2008 Expenses

[30] I do not propose to go through the 2008 claim for selling expenses at any length. Broadly the situation is very similar to 2007 and most of the expenses are not valid.

[31] I would simply note a couple of points. In 2008 in the Statement of Expenses filed with the return there is not only an amount of $2,884 claimed for "Boots and Gloves" but also an additional amount of $1,805 claimed for "Uniforms", a total of almost $4,700 claimed for non-existent expenses which are not required by the contract of employment: see paragraph 18 above.

[32] There are also 84 Starbucks receipts totalling $642 which the Appellant testified were to purchase drinks for customers and for employees who worked at the front of the store at the customer service desk. According to the Appellant this helped build rapport with customers; in the case of the fellow employees at the front it fostered good relations and helped him save sales when customers came back with a problem. The employees in front would call him to the front giving him the opportunity to try to save the sale thereby protecting his commission which would be lost if an item were returned. One of the employees at the front of the store was also his girlfriend at the time.

[33] In addition to my general difficulties with the Appellant's testimony I have an additional reason with respect to this particular expenditure. Many of the receipts are not readable but among those that are readable there appears to be overwhelmingly the cost of teas of various kinds and very little coffee — something that would be unlikely if these refreshments were for the benefit of a cross section of customers who came to the store to buy electronics.

[34] I do not accept that these expenses at Starbucks were selling expenses.

Conditions of Employment and the T2200 Forms

[35] Subparagraph 8(1)(*f*)(i) of the *Act* states that, among other conditions, salesman's expenses can only be claimed to the extent that the contract of employment requires the employee to pay them. Subsection 8(10) of the *Act* also provides that an employee making a claim for expenses in circumstances such as these may not claim a deduction unless:

> . . . a prescribed form, signed by the taxpayer's employer certifying that the conditions set out in the applicable provision were met in the year in respect of the taxpayer, is filed with the taxpayer's return of income for the year.

[36] The relevant form is called a T2200. The Minister's reply assumed that the T2200 forms submitted by the employer indicated that any expenses incurred by the Appellant were reimbursed by the employer in both years in issue.

[37] In the allegations with respect to the gross negligence penalties the Minister alleges that the T2200 forms submitted by the Appellant with his 2007 and 2008 taxation years were different than the ones provided by the employer. Of course, it is for the Minister to prove this particular allegation in relation to the gross negligence penalty.

[38] The evidence with respect to the T2200 forms was confusing. Multiple forms were produced with variations in their contents.

[39] I do not understand on what basis the Minister assumed that the Appellant was reimbursed for any employment expenses.

[40] The first page of the T2200 form filed with the return, the T2200 form at Tab B of Exhibit A-1 and the T2200 form filed as Exhibit R-10 all state that the employment contract required the employee to pay his own expenses while carrying out the duties of employment (question 1), the employee received no motor vehicle allowance (question 4) and the employee did not receive a repayment of expenses he paid (question 5).

[41] Exhibit R-1, the 2007 income tax return, only had the first page of the form. I do not know if that is because the second page was not filed with the return or if this is because the page was accidentally omitted when the return was reproduced for trial. Exhibit R-10 and Exhibit A-1, Tab B, are signed a day apart by different people.

[42] On the second page of both Exhibit R-10 and Exhibit A-1, Tab B, the employer states that the employee is required to pay for supplies used directly in his work and for the use of a cell phone. In answer to the question whether the Appellant was required to be away at least 12 consecutive hours from the municipality where the Appellant normally works one of the forms said: no, while the other said: yes, 2 or 3 times a month.

[43] To further confuse matters, all of the form T2200 for the 2007 year shows the following in question 4. After answering that the employee did not receive a motor vehicle allowance, in the same box in the second bullet after the line that says “if yes, indicate:”, it then states that a $0.44 per kilometre rate was used and that the amount received was $422.40, implying that a motor vehicle allowance was indeed received.

[44] For the 2008 year, the situation with respect to T2200s is also confusing. There is no form T2200 attached to the copy of 2008 income tax return filed in evidence, Exhibit R-2. Exhibit R-12, a form T2200 signed on 16 February 2009, appears to be a duplicate of the exhibit at Tab BB of Exhibit A-2 except for question 8 which is answered differently on Exhibit R-12. Exhibit R-11 is also a form T2200 for 2008 but it is signed on 27 September 2010 by the same person as the form T2200 at Tab BB of Exhibit A-2. Again there is a certain variation between the 16 February 2009 and the 27 September 2010 versions of the form T2200.

[45] The first pages of all the T2200s filed regarding 2008 agree that the employee did not receive a motor vehicle allowance although within the same box a per kilometre rate of payment is given but no amount is shown as paid. On the first page at question 5 they say that the employee received a repayment of expenses he or she paid to earn employment income, but they then both say at question 6 that the employee was required to pay his own expenses for "cell phone & automotive".

[46] On the second page of the earlier form T2200 (Tab BB of Exhibit A-2 and Exhibit R-12) it says that the employee is required under the contract of employment to pay for the supplies that the employee uses in his work and for his mobile phone; the later form T2200 for 2008, Exhibit R-1, says, in question 9, that the employee is not required under the contract of employment to pay for the supplies that he uses in his work and for his cell phone; however, in question 6 it says that the employee is required to pay for his mobile phone.

[47] One thing is quite clear from all these confusing documents. The Minister's bald assumption that in both years the employer reimbursed all employment expenses incurred is clearly unfounded. This was the only assumption made by the Minister with regard to the contractual terms of employment in respect of expenses incurred in the course of employment. The Minister also made the alternative assumption that the Appellant did not incur such expenses and that, if he did incur them, they were personal.

[48] The confusing evidence does not enable me to determine that some versions of the T2200s should be considered authoritative as opposed to others. Clearly, the T2200s show that it was envisaged that the employee would incur some expenses for which he would not be reimbursed. It is also clear that these expenses included the cost of supplies and use of the mobile phone.

[49] In 2008 the T2200s are all consistent that the Appellant would have to pay for his own automobile expenses (question 6). In the case of 2007 the T2200s are somewhat inconsistent on this but there is no reason for me to think that 2007 and 2008 were different. Given that the only assumption in respect of whether the Appellant had to pay his own expenses was rebutted and given the Appellant's own evidence, I conclude that he was required to pay his own automobile expenses as well as for supplies used and his mobile phone.

[50] The Appellant testified that he incurred the various other expenses claimed to boost sales but was less categorical when it came to conditions of employment. In particular, taken as a whole I do not understand his evidence to be that he was required to buy certain products or have home satellite television or home Internet in order to gain product knowledge. This may have been encouraged by the employer but it was not a contractual requirement. In any event, as previously indicated with respect to purchase of the products, home satellite and home Internet, these expenditures are essentially personal expenditures and are not deductible.

[51] With respect to any personal delivery of television sets that may have occurred, not only do we have no idea what proportion of car use this could represent but, given that the Appellant testified that this was done at his own initiative, it was clearly not a contractual requirement.

[52] I accept that business cards are a valid employment expense. I also accept that the Appellant was required to pay for his own mobile phone and pay for automobile expenses for travel related to his employment that were required under the contract. As previously indicated, such amounts are deductible only to the extent that they are: "wholly applicable to that source or such part [thereof] as may reasonably be regarded as applicable thereto".

[53] The automobile expenses required by contract are thus limited to those incurred to go to work at a location other than the Appellant's usual store when requested by the employer. The only quantum evidence that we have in respect of this is that some of the **T2200s** say that such requests may have occurred 2 to 3 times a month. Clearly only a very small portion of the Appellant's total automobile expenses for the year are employment related.

[54] In the case of the mobile phone there is even less information available as to the business portion of the expense.

Conclusion Regarding Salesman's Expenses

[55] In 2007 the total claimed for automobile expenses including fuel was just under $7,135. This included an amount of $3,600 for the purchase of a used car, an amount which should be capitalized and not expensed. The mobile phone cost in the 2007 year was about $1,601. In the circumstances, given that it is clear that there is some employment use an amount of $900 will be allowed for both of these costs.

[56] The amount of expenditure for business cards and the photograph taken for the card is clear. This totals $245.05 and is deductible in 2007.

[57] In 2008 there are again some business cards totalling $63.89; this is a valid expense. Again with respect to the mobile phone and the automobile expenses there is little evidence on which to base an allocation between valid employment expenses and personal expenses. Again to recognize that there is some modest amount that is a valid expenditure an amount of $900 will be allowed for both of these costs.

[58] As a consequence for the 2007 and 2008 taxation years respectively a total of $1,045.05 and $963.89 in employment expenses will be allowed.

Rental Losses in 2008

[59] The Appellant and his girlfriend at the time bought a residence in 2008; the Appellant owned 50% of the house. The Appellant and his girlfriend planned to live in part of the house and rent the other part of the house.

[60] They had to do a lot of work before they could rent the house and they only began to have a first tenant in December 2008. Based on the photographs produced at Tab UU of Exhibit A-2, I am satisfied the house needed a lot of work.

[61] The Minister assumed that the rental portion of the house amounted to 44% of the space in the residence. There was no evidence contradicting this allocation.

[62] The Appellant reported $375 in rental income for 2008 and expenses totalling $18,857 resulting in a loss of $18,482. Much of these expenses related to fixing up the house. The Appellant claimed his 50% share of the rental loss, $9,241, in his 2008 tax return. The Minister disallowed all but $320 of the expense claimed.

[63] The expenses claimed and the expenses proved by the Appellant at the hearing made no distinction between those incurred for the personal portion and those incurred for the rental proportion of the residence. Whatever the amount of expenses incurred for the entire property, in the absence of any specific link between an expense and the rental part of the house no more than 44% of the expenses may be claimed. The one exception to this is the two amounts totalling $110 for the student rental listing; the $110 amount is wholly deductible.

[64] Among the expenses claimed in relation to the rental income in the tax return is $1,982 in telecommunications costs. There are also approximately $2,500 in motor vehicle costs claimed in relation to the rental income.

[65] I note that for 2008 in relation to the Appellant's employment expenses the Appellant claimed over $7,400 in vehicle costs and over $4,700 in other travel costs. Together with the $2,500 claimed in relation to the rental this is a total of some $9,900 in motor vehicle claimed by the Appellant either as employment expenses or rental income expenses. I also note that the Appellant was only able to produce receipts for 2008 for dramatically less than the $9,900 amount in respect of motor vehicle expenses.

[66] Again, the Appellant kept no log and whatever the actual motor vehicle expenses were, there is no factual basis to allow one to determine what portion might relate to the rental expense. The same is true vis-à-vis any telecommunications expense. I am not satisfied that there are any material amounts in these two categories that are in relation to the rental expense.

[67] Although Mr. Ciurcovich taught the Appellant how to organize his receipts at the hearing he produced receipts for about $5,165 in relation to costs for the rental property, excluding vehicle or telecommunications costs: see Tab LL of Exhibit A-2. This compares with some $14,000 in expenses claimed, excluding vehicle costs and mobile phone costs.

[68] The largest of the amounts in the $5,165 is a payment of $1,866 to a law firm. Legal expenses should be allocated between the land and building and added to their capital cost. Capital cost allowance could be claimed against the cost of the residence but only to the extent of rental use of the property and only to the extent that it does not create a loss.

[69] The Appellant also testified that he put in the new floor but he did not have a receipt for this; in any event the new floor would likely be a capital expenditure rather than a current expenditure.

[70] There was also a receipt for $924 for insulation, which on the basis of the Appellant's testimony was an improvement. It should therefore be capitalized and not treated as a current expenditure.

[71] After deducting the $1,866 paid to the law firm and the $924 for insulation, there remains $2,375 of current expenses that are deductible. The rental portion of that expense is 44% x $2,265 which is equal to $996 plus the amount of $110 specifically for the rental listing for a total of $1,106. To this must be added the $320 previously allowed by the Minister for a total of $1,426 in expenses in respect of the rental property.

Amounts Claimed as Carrying Charges

[72] In respect of the 2007 and 2008 taxation years the Minister disallowed amounts of $1,858 and $2,308 respectively. This amount is described in Schedule 4 of the two returns as "administration fees, safety deposit box".

[73] At the hearing the Appellant stated that he had no idea what these were in relation to and abandoned the claim. There is no further need to deal with these claims.

Gross Negligence Penalties

[74] Finally, there is the matter of the gross negligence penalties under subsection 163(2) of the *Act*. There are two essential elements before such a penalty can be applied. The first is that there must be a false statement in the return. There is no question that there are a number of false statements in the two returns.

[75] The second element is whether the Appellant ". . . knowingly, or under circumstances amounting to gross negligence, has made or has participated in, assented to or acquiesced in the making of . . ." the false statements. It is well settled that gross negligence includes wilful blindness, see *Panini v. Canada*, 2006 FCA 224.

[76] When signing his return the Appellant certified that the information given was correct, complete and fully disclosed all his income. While taxpayers are not expected to be tax experts they are expected to make a reasonable effort at ensuring the accuracy of their return.

[77] Here, there are numerous red flags that should have raised questions in the Appellant's mind: for example, the claim for large sums under the heading "Boots and Gloves" when the Appellant had no expenses for boots and gloves, the claim for employment use of the totality of his motor vehicle expenses, the claim for the totality of his mobile, Internet and satellite television expenses and the failure to allocate any expenses to personal use of the house he bought as opposed to the portion used for rental income.

[78] The only possible explanation for this failure to ask questions is wilful blindness on the part of the Appellant. Accordingly, the penalty is properly levied.

Conclusion

[79] Consequently, the appeal will be allowed but only for the purpose of the Minister making the following changes:

a. in the 2007 taxation year, employment expenses totalling $1,045.05 are to be allowed;

b. in the 2008 taxation year, employment expenses totalling $963.89 and rental expenses totalling $1,426 are to be allowed;

c. in both taxation years the penalties under subsection 163(2) of the *Act* are to be adjusted to take account of the expenses allowed.

Signed at Ottawa, Canada, this 27th day of September 2016.

"Gaston Jorré"

Jorré J.

CITATION:	2016 TCC 186
COURT FILE NO.:	2016-139(IT)I
STYLE OF CAUSE:	JAY Z. KALRYZIAN v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Hamilton, Ontario
DATE OF HEARING:	August 15, 2016
REASONS FOR JUDGMENT BY:	The Honourable Justice Gaston Jorré
DATE OF JUDGMENT:	August 26, 2016
DATE OF AMENDED JUDGMENT AND AMENDED REASONS FOR JUDGMENT:	September 27, 2016

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Dominique Gallant

COUNSEL OF RECORD:

For the Appellant:	
Firm:	
For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada